

ESTTA Tracking number: **ESTTA579124**Filing date: **12/27/2013**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Einstok Beer Company, L.P.		
Entity	Limited Partnership	Citizenship	California
Address	875 Via De La Paz Pacific Palisades, CA 90272 UNITED STATES		

Attorney information	Keith A. Weltsch Scully, Scott, Murphy & Presser, P.C. 400 Garden City Plaza Suite 300 Garden City, NY 11530 UNITED STATES intprop@ssmp.com Phone:516-742-4343
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**Registration Subject to Cancellation**

Registration No	4395373	Registration date	09/03/2013
Registrant	Hensley Cary 180 madison ave suite 1501 New York, NY 10016 USX		

**Goods/Services Subject to Cancellation**


Class 025. First Use: 2012/09/01 First Use In Commerce: 2012/09/01 All goods and services in the class are cancelled, namely: Hats; Jackets; Jeans; Jerseys; Knit bottoms; Knit dresses; Knit jackets; Knit shirts; Knit tops; Tops; Wearable garments and clothing, namely, shirts
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**Grounds for Cancellation**

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Priority and likelihood of confusion	Trademark Act section 2(d)
Other	Non-use - Registrant is not using the mark in interstate commerce in connection with all the goods that are the subject of the registration.

**Mark Cited by Petitioner as Basis for Cancellation**

U.S. Registration No.	4150896	Application Date	09/16/2010
Registration Date	05/29/2012	Foreign Priority Date	NONE

Word Mark	EINSTÖK
Design Mark	
Description of Mark	NONE
Goods/Services	Class 032. First use: First Use: 2011/05/00 First Use In Commerce: 2011/05/00 Beer

Attachments	85131289#TMSN.jpeg( bytes ) Petition for Cancellation.pdf(2823168 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Keith A. Weltsch/
Name	Keith A. Weltsch
Date	12/27/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of U.S. Registration No. 4,395,373  
Registered on September 3, 2013  
For the Mark EINSTÖK

-----X	
Einstok Beer Company, L.P.	:
	:
	:
Petitioner	:
	:
v.	:
	:
Cary Hensley	:
	:
Respondent.	:
-----X	

Cancellation No.

**PETITION FOR CANCELLATION**

Einstok Beer Company, L.P., (“Petitioner”) a limited partnership organized under the laws of California believes that it will be damaged by the continued use and registration of the mark EINSTÖK registered under U.S. Reg. No. 4,395,373, and hereby petitions to cancel the same.

As grounds therefore it is alleged that:

1. Cary Hensley (“Respondent”), an individual, obtained a registration for the mark EINSTÖK covered by U.S. Reg. 4,395,373 for “Hats; Jackets; Jeans; Jerseys; Knit bottoms; Knit dresses; Knit jackets; Knit shirts; Knit tops; Tops; Wearable garments and clothing, namely, shirts” in International Class 25 on September 3, 2013.
2. Petitioner is a company that primarily markets and distributes beer in the United States and through the world, in addition to offering ancillary branded clothing products, including, but not limited to, clothing, under the brand name EINSTÖK.

3. Petitioner is the owner of U.S. trademark registration 4,150,896 (“the Petitioner’s ‘896 registration”) for the mark EINSTÖK for use in connection with “beer”. A status and title copy of said registration is attached hereto as Exhibit “A”.

### **LIKELIHOOD OF CONFUSION**

4. There is no issue with respect to priority of use, as the Petitioner’s ‘896’ registration issued prior to the alleged date of first use of the Respondent’s EINSTÖK mark, as well as the filing date associated with Respondent’s EINSTÖK registration.

5. Petitioner’s EINSTÖK mark is exactly identical to Respondent’s EINSTÖK mark.

6. Further, Petitioner has been distributing continuously, in interstate commerce, clothing bearing the EINSTÖK brand name since at least as early as 2011, which is earlier than the alleged date of first use of the Respondent’s EINSTÖK mark, as well as the filing date associated with Respondent’s EINSTÖK registration.

7. The products offered and sold by Petitioner in conjunction with its EINSTÖK mark are very closely related to those covered by the EINSTÖK registration owned by Respondent.

8. Petitioner has expended considerable effort and expense in promoting its EINSTÖK mark and the goods sold under such mark, with the result that the purchasing public has come to know, rely upon, and recognize the products of Petitioner by such mark.

9. If the Respondent is permitted to retain the registration sought to be cancelled, and thereby the *prima facie* exclusive right to use in commerce the mark EINSTÖK on clothing in Class 25, confusion in trade is likely to result from any concurrent use of Petitioner’s EINSTÖK mark and that of Respondent’s EINSTÖK mark, all to the great detriment of Petitioner, who has expended considerable sums and efforts in promoting its mark.

10. Purchasers are likely to consider the goods of Respondent sold under the EINSTÖK mark as emanating from Petitioner, and purchase such goods as those of Petitioner, resulting in loss of sales to Petitioner.

11. Concurrent use of the EINSTÖK mark by Respondent and Petitioner may result in irreparable damage to Petitioner's reputation and goodwill, if the goods sold by Respondent are of inferior quality since purchasers are likely to attribute the source of Respondent's goods to the Petitioner.

12. Respondent's EINSTÖK mark is confusingly similar to Petitioner's EINSTÖK mark and is likely to cause mistake, deception or confusion to Petitioner's irreparable damage and injury, in violation of § 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

#### **NON-USE OF THE MARK ON THE LISTED GOODS**

13. Respondent filed an application for the mark EINSTÖK based on actual use in commerce as of the application filing date, indicating in the subject application that he was using the EINSTÖK mark on or connection with "Hats; Jackets; Jeans; Jerseys; Knit bottoms; Knit dresses; Knit jackets; Knit shirts; Knit tops; Tops; Wearable garments and clothing, namely, shirts" as of the application filing date.

14. Respondent was not using the EINSTÖK mark on, or in connection with all of the goods that are the subject of Respondent's EINSTÖK registration in interstate commerce, namely, "Hats; Jackets; Jeans; Jerseys; Knit bottoms; Knit dresses; Knit jackets; Knit shirts; Knit tops; Tops; Wearable garments and clothing, namely, shirts" as of the application filing date, and upon information and belief, any such use of the EINSTÖK mark by Respondent as of the application filing date was at most, limited to jeans.



15. Accordingly, Respondent is not entitled to maintain his registration for the EINSTÖK mark on the basis of use in commerce as of the application filing date for the goods on which use of the mark did not commence as of the application filing date.

### **FRAUD IN THE PROCURMENT OF THE REGISTRATION**

16. Respondent filed an application for the EINSTÖK mark, which was assigned Serial No. 85/817,027, asserting that it was using the referenced mark on, or in connection with, “Hats; Jackets; Jeans; Jerseys; Knit bottoms; Knit dresses; Knit jackets; Knit shirts; Knit tops; Tops; Wearable garments and clothing, namely, shirts” as of the application filing date.

17. Respondent knew at the time he filed his application for the EINSTÖK mark that he was not using the mark on all of the subject goods covered by the application ultimately assigned Serial No. 85/817,027.

18. Respondent’s misrepresentation that it was using the EINSTÖK mark on all of goods listed in its application as of the application filing date was made with an intent to deceive the Trademark Office for the purpose of deceiving the Trademark Office into improperly issuing a registration on Respondent’s behalf for the EINSTÖK mark, and therefore, constitutes fraud.

### **RELIEF**

19. In view of the above allegations, Respondent is not entitled to continue registration of his EINSTÖK mark because the same is likely to cause confusion with Petitioner’s EINSTÖK mark about which there is no dispute with regard to priority, as well as the fact that Respondent engaged in fraud in its procurement of his EINSTÖK registration.

20. Respondent is not entitled to maintain his registration for any goods on which he had not commenced use of in interstate commerce as of the application filing date on the grounds that the registration would be void *ab initio* for such goods.

21. Petitioner hereby requests that the required \$300 fee to cancel U.S. Reg. No. 4,395,373 proscribed under 37 C.F.R. §2.6 be withdrawn from Deposit Account No. 19-1013.

WHEREFORE, Petitioner respectfully prays that U.S. Reg. No. Registration No. 4,395,373 be canceled in its entirety.

Petitioner hereby appoints the following attorneys, to whom all correspondence should be addressed, to prosecute this Cancellation and transact all business in the Patent and Trademark Office connected therewith:

Please address all correspondence to:

Keith A. Weltsch  
SCULLY, SCOTT, MURPHY & PRESSER  
400 Garden City Plaza, Suite 300  
Garden City, New York 11530  
Telephone: (516) 742-4343

Dated: December 27, 2013

Respectfully submitted,  
Einstok Beer Company, L.P.

By: 


Keith A. Weltsch  
SCULLY, SCOTT, MURPHY & PRESSER  
400 Garden City Plaza, Suite 300  
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General Email: [intprop@ssmp.com](mailto:intprop@ssmp.com)

COUNSEL FOR PETITIONER

#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **PETITION FOR CANCELLATION** is being deposited with the United States Postal Service as first class mail, postage prepaid, to Respondent on this 27<sup>th</sup> day of December, 2013 as follows:

Mr. Cary Hensley  
180 Madison Ave. Ste 1501  
New York, New York 10016-5201

  
Keith A. Weltsch

**Exhibit "A"**





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# EINSTÖK

<b>Word Mark</b>	EINSTÖK
<b>Goods and Services</b>	IC 032. US 045 046 048. G & S: Beer. FIRST USE: 20110500. FIRST USE IN COMMERCE: 20110500
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	85131289
<b>Filing Date</b>	September 16, 2010
<b>Current Basis</b>	1A
<b>Original Filing Basis</b>	1B
<b>Published for Opposition</b>	March 1, 2011
<b>Registration Number</b>	4150896
<b>International Registration Number</b>	1070841
<b>Registration Date</b>	May 29, 2012
<b>Owner</b>	(REGISTRANT) EINSTOK BEER COMPANY, L.P. David Altshuler, a U.S. citizen, Jack Sichterman, a U.S. citizen, and B Iceland USA, Inc., a corporation of Delaware LIMITED PARTNERSHIP CALIFORNIA 875 Via de La Paz Pacific Palisades CALIFORNIA 90272
<b>Assignment Recorded</b>	ASSIGNMENT RECORDED
<b>Attorney of Record</b>	Keith A. Weltsch

Type of Mark      TRADEMARK  
Register      PRINCIPAL  
Live/Dead Indicator **LIVE**

TESS HOME   NEW USER   STRUCTURED   FREE FORM   BROWSE DICT   SEARCH OG   TOP   HELP   PREV LIST   CURR LIST   NEXT LIST  
FIRST DOC   PREV DOC   NEXT DOC   LAST DOC

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